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JOHN F. DAVIS, CLE

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1968
No. 1164

IRVING A. KANAREK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER

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Counsel for Petitioner,
Pro Se

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The Respondent, in the Brief in Opposition, has completely omitted from said Brief any reference to the legal issues revolving around 28 U.S.C. 1738, 28 U.S.C. 1739, and Rule 44 of the Federal Rules of Civil Procedure. These statutes and said Rule 44 have a significant place in this case in view of the breach which took place as to these two statutes and Rule 44 in the procedure followed in the Court of Claim. (Petition for Writ of Certiorari, p. 3, p. 5, p. 6, p. 16, p. 17, Appendix C, p. C-3, p. C-4, and p. C-5). The testimony of the witness Zack should not have been admitted or used (Petition for Writ of Certiorari, p. 16 and p. 17).

Respondent has referred to Taylor v. McElroy, 360 U.S. 709 at 711, and Greene v. The United States, 376 U.S. 149 in the Brief in Opposition at pp. 7 and 8 thereof, evidently relying very heavily upon said cases. It is significant to note that in Taylor v. McElroy, the ultimate relief prayed for was the restitution of security clearance status, not money damages; in Greene v. The United States, supra, the money damages requested was predicated upon purported applicability of the monetary restitution provisions of the regulation or directive which was found to be unauthorized in Greene v. McElroy, 360 U.S. 474. Except for what appears to be a passing reference to the Just Compensation Clause of the Fifth Amendment, it does not appear that Greene seriously raised any other bases for recovery of monetary damages than the aforementioned monetary restitution provisions. (Greene v. The United States, at p. 158). Petitioner herein has demonstrated bases for recovery, other than the purported monetary restitution provisions, and, assuming, arguendo, that the Just Compensation Clause is not a valid basis for recovery, bases other than said Just Compensation Clause; for instance, the Due Process Clause of the Fifth Amendment. (See "PLAINTIFF'S OBJECTIONS TO DEFENDANT'S MOTION TO DISMISS -- PLAINTIFF'S PETITION STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED," and "PLAINTIFF'S RESPONSE BRIEF TO DEFENDANT'S REPLY TO PLAINTIFF'S OBJECTIONS TO DEFENDANT'S MOTION TO DISMISS": briefs filed with the Court of Claims which are part of the Certified Record before

this Court). In Dooley v. The United States, 182 U.S. 222 at 224, this Court, in referring to an earlier version of what is now 28 U.S.C. 1491, indicated that the statute contemplated "distinct classes of cases" (Petition for Writ of Certiorary, p. 15).

This Court has stated, as far back as 1948, that "hospitable scope" should be given to suits for money damages against the sovereign, which the instant suit is, indicating that there "may be substance" to the viewpoint that

> "the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible." (Larson v. Domestic and Foreign Commerce Corporation, 93 Law.Ed. 1643).

Further back than 1948, in 1939, Mr. Justice Frankfurter, speaking for the Court in Keifer and Keifer v. Reconstruction Finance Corporation, 59 S.Ct. 516 at 519, refers to

> "an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor . . ."

The response of Petitioner to the positions of the Government as purportedly reflected in the first three cases at p. 9 of the Brief in Opposition is that the instant case reflects a compensable "taking;" furthermore, as indicated, supra, and in

the Petition, itself, Petitioner has bases of recovery independent of the Just Compensation Clause of the Fifth Amendment; as to respondent's positions purportedly asserted on the rest of p. 9 and p. 10 of the Brief in Opposition (including footnote 6 beginning at p. 8) no ~~intent~~ merit exists in respondent's positions as to the instant case even, assuming, arguendo, the medieval doctrine of sovereign immunity exists in some measure, because, as stated previously, Petitioner has SEVERAL INDEPENDENT BASES for recovery; of particular significance in connection with Petitioner's request that Certiorari be granted is the fact that Bailey v. Richardson, 341 U.S. 918 was affirmed by an equally divided Court.

The state of the law as to the issues posed in this case, issues which involve multitudes of people in their dealings with matters pertaining to the Federal Government, the fact that no other forum is available to review the action of the Honorable Court of Claims, below, including action which improperly admitted for vital consideration the testimony of one Mr. Zack of the California Department of Employment, speaks eloquently on behalf of the proposition that this Court should grant Certiorari and decide the issues involved after complete apprisal by way of briefs and oral argument on the merits.

PRAYER

It is respectfully requested that this Court grant the Petition for Writ of Certiorari.

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